



Fuel cards: Commissionaire scheme for chain supply - VAT Committee's Guidelines & Working Paper

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1 Background

The VAT classification of fuel card transactions has been subject to considerable legal uncertainty, at least since the ECJ ruling in the *Auto Lease Holland* case (C-185/01) and this uncertainty was intensified by virtue of the ECJ ruling in the *Vega International* case (C-235/18, see KMLZ VAT Newsletter 25 | 2019). Regardless of the civil contractual agreements and actual settlements existing between mineral oil companies (MOC), fuel card issuers (CI) and fuel card customers (CC), the ECJ rejected the qualification of such transactions as a fuel supply in a chain transaction. The ECJ made this finding based on the doubt it held concerning the actual transfer of the power of disposal of the fuel by the CI. In the wake of the *Vega* case, further divergent developments emerged at national tax administration level regarding fuel card transactions across the EU. Correspondingly, the fuel card and logistics industry mobilised, through associations and business representatives, and initiated a discussion at the level of the EU Commission. A good two years of intensive work resulted in Working Paper 1067 being published on 22 September 2023 and the VAT Committee's Guidelines of 6 September 2023.

2 VAT Committee Guidelines of 6 September 2023

The VAT Committee has almost unanimously established the following Guidelines for fuel card transactions:

- Where fuel is supplied to a CC under a fuel card scheme, according to the decision in the *Vega* case, the supply made by the CI to the CC shall, in principle, not be categorised as a fuel supply but rather a supply of a financial service.
- Where fuel is supplied under a fuel card scheme, which is structured as a commissionaire structure falling under Art. 14(2)(c) EU VAT Directive, there shall be a supply of fuel by the MOC to the CI without there being a requirement of a transfer to that CI of the right to dispose of the fuel as owner.



Fresa C. Amthor
Lawyer, Certified Tax
Consultant

+49 (0) 89 217 50 12-45
fresa.amthor@kmlz.de

For a fuel card scheme to fall under Art. 14(2)(c) EU VAT Directive, all of the following conditions must be met (cumulatively):

- 1) Ownership of the fuel, in the sense of formal legal title, is transferred to the CI.
- 2) The supplies, to and by the CI (intermediary), are similar.
- 3) An agreement exists between the commission agent and the principal.

The Guidelines further specify the above three conditions with more detailed criteria, and in fact closely follow the German Ministry of Finance's Circular of 15.06.2004, issued in the wake of the ECJ ruling in the *Auto Lease Holland* case. Only if the cited criteria are fulfilled, at minimum, shall a commissionaire structure be considered to exist and this does not only include general requirements for a commissionaire structure, such as an agreement that the CI acts on behalf of a third party (as a buying or selling commission agent). Specific regulations are also required, e.g. on non-payment, claims for damages and price agreements.

Finally, the VAT Committee (almost unanimously) also agrees that these Guidelines shall be without prejudice for any prior characterisation of fuel card transactions and, in particular, shall not apply retrospectively.

3 Working Paper 1067

The Working Paper 1067 contains further explanations. The standard "buy/sell" model, i.e. fuel card transactions structured as chain transactions based on a contract, according to which the CI buys and sells fuel in his own name and for his own account, is rejected with reference made to the *Vega* ruling, unless it can be established otherwise that the CI acquires actual power of disposal of the fuel within the meaning of Art. 14(1) EU VAT Directive. However, in the case of a commissionaire structure, as set out in the Guidelines, the deviating wording in Art. 14(2)(c) EU VAT Directive ("the transfer of goods pursuant to a contract") does not require an actual transfer of the power of disposal. Rather, the transfer of ownership, as a legal title under civil law, suffices for the qualification as a (deemed) supply of goods. As a result, for VAT purposes, the fiction of a chain supply, known from other commissionaire structures, shall apply to fuel card schemes set up in a commissionaire structure, with all of its consequences.

4 Practical implications and recommendations for action

The VAT Committee Guidelines are not legally binding. They exclusively reflect the views of an advisory committee on specific questions raised by the Commission or Member States on the application of EU VAT rules. Accordingly, national positions on the issue of fuel card transactions remain applicable. Nevertheless, these Guidelines, with their high approval rating, are apt to influence legal development on the topic at EU level and in the Member States. Individual Member States are expected to finalize administrative directives, which had been postponed due to the discussions of the VAT Committee. An influence on substantiations for future requests for binding rulings or judgements can also be expected. It remains to be seen whether the German Ministry of Finance's Circular, which was distributed as a draft at the end of 2021 (see KMLZ VAT Newsletter 36 | 2021), will also be adapted and published.

Affected companies are advised to adapt their contracts for fuel card transactions to the Guidelines. As with the Guidelines and the legal situation concerning Art. 14(2)(c) EU VAT Directive, a relative legal certainty can be achieved on the grounds of good reasoning in many Member States, especially in contrast to the controversial ECJ rulings.